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No. 890

In the Supreme Court of the United States

OCTOBER TERM, 1969

JEROME B. BLUHM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (Pet. App. 10a–17a) are officially reported at 287 F. Supp. 886. The corrected opinion of the court of appeals (Pet. App. 1a–8a) is reported at 414 F. 2d 1240.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1969. On September 5, 1969, the court of appeals denied petitioner's timely petition for rehearing, and on September 9, 1969, it filed a corrected opinion. The petition for a writ of certiorari

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was filed November 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether previously filed federal tax liens were superior to an interest derived from later arising local tax liens which had been extinguished by judicial action prior to the effective date of the Federal Tax Lien Act of 1966.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 7–10.

STATEMENT

This action was brought by the United States on December 24, 1964, to reduce federal tax liens to judgment and to foreclose the liens against certain property (including real estate in Wilmette, Illinois) owned by taxpayers John and Gertrude Amos (R. 2, 13, 14).[1] A default judgment was entered against taxpayers (R. 16–17). The United States had federal tax liens on taxpayers' property by virtue of assessments and notices of federal tax liens which were filed with the Recorder of Deeds of Cook County, Illinois, as follows (Pet. App. 11a):[2]

[1] "R." refers to the appendix to petitioner's brief in the court of appeals, which is included in the record in this Court.

[2] On May 18, 1960, taxpayers submitted an offer in compromise to the Internal Revenue Service in which they waived the running of the statute of limitations on collection for the period the offer was pending and for one year thereafter. The offer was rejected on January 30, 1961, with the result that the period of limitations was extended to January, 1966 (Pet. App. 11a).

Taxable year	Date of assessment	Date notice of tax lien filed	Amount outstanding [1]
1950	May 23, 1958	September 3, 1958	$48,678.57
1951	do	do	48,383.32
1952	do	do	37,100.42
1953	do	do	34,736.47
1954	February 3, 1961	April 10 and 24, 1961	1,023.53
1958	September 27, 1963	February 4, 1964	2,272.42
1957	do	February 4, 1964	7,629.24
Total			181,823.97

[1] Plus interest, according to law.

Petitioner, who was allowed to intervene in the instant action (R. 18), claimed an interest in the Wilmette real estate superior to that of the United States. The taxpayers had been delinquent in the payment of their 1960 local real estate taxes and, accordingly, that property was sold at a tax sale on February 27, 1962 (R. 27–28). The property was not redeemed from the sale (the period of redemption having expired February 16, 1964); on October 31, 1964, the purchaser filed a petition for issuance of a tax deed, which the Circuit Court of Cook County issued on June 18, 1965 (R. 22, 28). That deed passed to petitioner, through mesne conveyances, on June 7, 1966 (R. 29). Notice of the petition for a tax deed had been given to the District Director of Internal Revenue in Chicago (R. 28), to the United States Attorney for the Northern District of Illinois (Pet. App. 12a–13a), and to the Attorney General in November, 1964 (R. 71), but the United States did not respond to the petition. At the time petitioner obtained his interest in the property on June 7, 1966, notices of the federal tax liens were on record at the office of the Recorder of Deeds of Cook County, and, at the same office, there was of

record a notice of *lis pendens* which the United States caused to be filed with respect to the property at the commencement of this action (R. 28–29, 53; Pet. App. 13a).

The District Court held that the interest of the United States was superior to that of petitioner and granted the United States' motion for summary judgment (Pet. App. 10a–17a). The court of appeals affirmed (Pet. App. 1a–8a).

ARGUMENT

The decision below, affirming that of the District Court, was correct. There is no conflict among the circuits, and there is no basis for further review.

1. The federal tax liens were first in time, and, under the law in effect at the relevant time, first in right. *United States* v. *New Britain*, 347 U.S. 81. Only a *junior* federal tax lien can be extinguished by state proceedings to which, as here, the United States is not a party, and the United States is an indispensable party to any proceeding purporting to adjudicate its rights under *senior* tax liens. *United States* v. *Brosnan*, 363 U.S. 237; *United States* v. *Roessling*, 280 F. 2d 933, 935–936 (C.A. 5). The well-established procedures of 28 U.S.C. 2410 (*infra*, pp. 8–10) for obtaining the United States' consent to be sued in such instances clearly were not followed in the state proceeding. Moreover, at all times pertinent to this proceeding and to the tax sale, Section 2410(*c*) has specifically provided that any sale to satisfy a lien junior to the interest of the United States (as in this case) does not affect the

senior interest of the United States unless the United States has consented that the purchaser may take free of such federal interest. No such consent was given in the instant case.

2. The Federal Tax Lien Act of 1966, P.L. 89–719, 80 Stat. 1125 (*infra*, p. 10) amended Section 6323, Internal Revenue Code of 1954, to provide that, even though notice of a federal tax lien has been filed, the holder of a lien on real property which secures the payment of an ad valorem tax of general application is entitled to priority over the federal tax lien if his lien entitles him, under local law, to priority over other security interests in the same propeity even if prior in time. Here, although the decision below was not filed until after the effective date of this amendment (November 2, 1966), the local real estate liens were satisfied long prior to that date, on February 27, 1962, when the property was sold. The superpriority created by the 1966 Act would have given priority to the local government lien if that lien had existed on the effective date, but there is nothing in the amendment that retroactively validates a previously extinguished lien, whether or not a particular mesne conveyance has later occurred. The state court in 1964 could not adjudicate the lien rights of the federal government under a law that did not exist until 1966.

3. The decision below does not conflict with *United States* v. *Bleasby*, 257 F. 2d 278 (C.A. 3), which presented unique questions involving the interrelationship of the New Jersey law regarding forfeiture of

contraband (cash admittedly used in gambling) and the federal law regarding priority of tax liens. The contraband was, under local law, deemed forfeited to the state not later than the date of seizure. This date was prior to the date the United States attemped to perfect its tax lien; therefore the taxpayer in *Bleasby* had no interest to which the lien could attach. The state court could obtain proper jurisdiction over the *res* without violating the principles of sovereign immunity because the United States claimed no interest in the property effective at the time of the relevant state proceedings. Cf. *Farley* v. *$168,400.97*, 55 N.J. 31, 259 A. 2d 201; *Spagnuolo* v. *Bonnet*, 16 N.J. 546, 109 A. 2. 623.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1970.

APPENDIX

Internal Revenue Code of 1954, Section 6323 [as amended by Sec. 101(a) of the Federal Tax Lien Act of 1966, P.L. 89–719, 80 Stat. 1125]. VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS.

(a) *Purchases [Purchasers], Holders of Security Interests, Mechanic's Lienors, and Judgment Lien Creditors.*—The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate.

(b) *Protection for Certain Interests Even Though Notice Filed.*—Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid.—

* * * * *

(6) *Real property tax and special assessment liens.*—With respect to real property, as against a holder of a lien upon such property, if such lien is entitled under local law to priority over security interests in such property which are prior in time, and such lien secures payment of—

(A) a tax of general application levied by any taxing authority based upon the value of such property;

(B) a special assessment imposed directly upon such property by any taxing authority, if such assessment is imposed for the purpose of defraying the cost of any public improvement; or

(C) charges for utilities or public services furnished to such property by the United States, a State or political subdivision thereof, or an instrumentality of any one or more of the foregoing.

* * * * *

(26 U.S.C. 6323.)

28 U.S.C. 2410. Actions affecting property on which United States has lien.

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United

States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who

may issue a certificate releasing the property from such lien.

Federal Tax Lien Act of 1966, P.L. 89–719, 80 Stat. 1125.

SEC. 114. EFFECTIVE DATE.

(a) *General Rule.*—Except as otherwise provided, the amendments made by this title shall apply after the date of enactment of this Act, regardless of when a lien or a title of the United States arose or when the lien or interest of any other person was acquired.

(b) *Exceptions.*—The amendments made by this title shall not apply in any case—

(1) in which a lien or a title derived from enforcement of a lien held by the United States has been enforced by a civil action or suit which has become final by judgment, sale, or agreement before the date of enactment of this Act; or

(2) in which such amendments would—

(A) impair a priority enjoyed by any person (other than the United States) holding a lien or interest prior to the date of enactment of this Act;

(B) operate to increase the liability of any such person; or

(C) shorten the time for bringing suit with respect to transactions occurring before the date of enactment of this Act.

* * * * *

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